BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate	)	WC Docket No. 02-148
Affiliate and Related Requirements	)	

COMMENTS OF THE
TEXAS OFFICE OF PUBLIC UTILITY COUNSEL

The Texas Office of Public Utility Counsel ("OPC")[1] submits these comments in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission in FCC 02-148. The Commission seeks comment regarding the sunset of certain structural separation and nondiscrimination safeguards imposed on the BOCs when they provide in-region interLATA toll services. Section 272(f)(1) of the Telecommunication Act of 1996 provides that most of the safeguards will expire three years after a BOC is authorized to provide in-region interLATA services unless the Commission extends the three year period by rule or order.

The Commission notes that in enacting Section 272, Congress recognized that the local exchange market would not be fully competitive upon its opening, but over time competitors would enter the local market and provide alternative sources of local exchange and originating access services.[2] To the extent that such alternatives exist in the marketplace, the BOCs should be constrained in their ability to discriminate against competing providers of interexchange

[1] OPC is a state agency representing the interests of Texas residential and small business consumers on telephone and electric issues. TEX. UTILITIES CODE ANN. Ch. 13 (Vernon 1998 and 2002).
[2] Notice ¶¶ 5.

service. The Commission asks whether circumstances have changed in three years to warrant the sunset of statutory requirements. Clearly, circumstances have not changed. BOCs still retain monopoly control over the provision of local service and thus have substantial ability and incentive to discriminate against interexchange competitors. The Commission's own report on local competition finds that incumbent local exchange carriers control 91% of end user switched access lines and 94.5% of residential and small business end user switched access lines. In the State of Texas, ILECs controlled 94% of total access lines and 91% of total local revenues in 1999. For residential customers, ILECs controlled 96.7% of total access lines and 93.9% of residential revenues.[3]

In January 2001, the Public Utility Commission of Texas stated:

> …the market for business customers in the large metro areas of Texas has strong potential for genuine competition, although the levels of market penetration as of 1999 are too low to declare that full competition has arrived. Whether residential and rural customers will have sustainable competition in the near future is less certain.
>
> Events in the year 2000 have changed conditions for local exchange competition in Texas and across the nation. Competitive local exchange company (CLEC or competitor) stocks have seen a slump in share prices. AT&T, Sprint, and Worldcom announced major company reorganizations with decreased focus on serving residential mass markets. These events suggest that competitors may be heading for a period of consolidation – between companies and within markets. A number of key competitors that were expected to challenge Southwestern Bell and Verizon now seem to be limiting their entry into general residential voice markets.
>
> Because Southwestern Bell can now compete for long distance customers in Texas, the company has made a strong push in 2000 to bundle its offerings to provide residential customers with various options for "one-stop

[3] Report to the 77th Texas Legislature, Scope of Competition in Telecommunications Markets of Texas, Public Utility Commission of Texas, January 2001, pp 38, 41 and 42. The report does not provide access line and revenue information separately for the BOCs and other non-BOC ILECs.

> shopping." …Southwestern Bell also gained a sizeable portion of the long distance market just months after offering long distance service for the first time. Southwestern Bell's largest and strongest competitors have not been offering substantial competition in vertical services or in bundling local residential services with long distance or other services and have lost market share in long distance service.[4]

The extremely low levels of competitive entry in the Texas local service markets, and the recent financial failures and SEC investigations of several competing local and long distance carriers, indicate that Texas ILECs retain substantial market power and have the incentive to discriminate against competitors. OPC urges the Commission to extend by rule the structural separation and nondiscrimination safeguards contained in Section 272.

The Commission also requests comments on a range of options for implementing 272(f)(1). The first option is to allow the statutory requirements to sunset three years after section 271 authorization is received. OPC, as discussed above, does not support this option. All the statutory requirements should remain in place. The second option is to extend the statutory requirements for a defined period of time. The Commission suggests that the statutory requirements might be extended until the results of the second biennial audit are received for a particular state. At the very least, the Commission should not sunset the statutory requirements until there is strong evidence that the BOCs cannot exercise any monopoly market power in the provision of local exchange service. OPC believes that this will certainly take longer than the couple of years that will have elapsed between the first and second audits.

The Commission's remaining three options are to sunset the statutory requirements but adopt less stringent separation requirements, sunset the separate affiliate requirements but retain the nondiscrimination requirements and/or biennial audit, or adopt nonstructural safeguards.

[4] Ibid, p. ix and x.

None of these options are feasible given the current state of competition in the local exchange market. The current structural safeguards were put into place specifically to prevent discriminatory behavior by the BOCs against competitors, and to prevent cross subsidization of competitive services by monopoly local exchange services. All the structural safeguards currently in place under Section 272 are necessary if these goals are to be achieved. Adopting less stringent or few structural safeguards would be inadequate to protect consumers and competitors from potential BOC anticompetitive behavior.

In summary, the Commission should extend the current 272 safeguards by rule until it can be shown that the BOCs no longer have monopoly power in their respective service territories on a state by state basis. For the near future, all these safeguards are necessary to protect interexchange competition and consumer choice.

OPC thanks the FCC for the opportunity to provide these comments.

Signed this 17th day of July, 2002.

Respectfully submitted,

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